IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1423

CHARLES E. SIGETY, d/b/a FLORENCE NIGHTINGALE NURSING HOME,

Appellant,

against

RICHARD V. HORAN, Welfare Inspector General of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1423

CHARLES E. SIGETY, d/b/a FLORENCE NIGHTINGALE NURSING HOME,

Appellant,

against

RICHARD V. HORAN, Welfare Inspector General of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellee, Richard V. Horan, Welfare Inspector General of the State of New York, respectfully moves the Court pursuant to Rule 16(a)(b) to dismiss this appeal on the ground that appellant has failed to raise a substantial federal question, and, in part, for want of jurisdiction.

Opinions Below

The memorandum decision of the Court of Appeals of the State of New York is reported at 40 N Y 2d 1085; 360 N.E. 2d 1103, and 392 N.Y.S. 2d 421 and is reproduced

at page 7a of the Jurisdictional Statement (hereinafter "J.S."). The opinion of the Appellate Division of the Supreme Court, First Department is reported at 50 A D 2d 779, 376 N.Y.S. 2d 552 and is reproduced at J.S. 3a. The memorandum decision of Supreme Court, New York County, Special Term, is unreported and is reproduced at J.S. 1a.

Jurisdiction

The opinion of the New York Court of Appeals was rendered on January 13, 1977. Notice of Appeal was filed on or about January 26, 1977. Appellant invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1257(2).

Question Presented

Whether a state statute requiring public disclosure of reports by state officials on the conditions existing at skilled nursing facilities which are Medicaid providers pursuant to Title XIX of the Social Security Law, made pursuant to state law for state regulatory purposes, violates the Constitution and laws of the United States for failure to allow the "provider" an opportunity for inspection of the report and comment thereon prior to its release?

Statute Involved

N.Y. Public Health Law § 2805-e provides:

Maintenance of records

1. Every residential health care facility shall maintain, as public information available for public inspection under such conditions as the commissioner shall prescribe, records containing copies of all and inspection reports pertaining to the facility that have been filed with or issued by any governmental agency.

Copies of such inspection reports shall be retained in said records for ten years from the date said reports are filed or issued.

2. The office of the commissioner and each regional office of the department shall make available for public inspection and at a nominal cost provide copies of all financial and inspection reports of residential health care facilities filed with or issued by the department.

3. Nothing contained in this section shall be construed or deemed to require the public disclosure of confidential medical, social, personal or financial records of any patient. The commissioner shall adopt such regulations as may be necessary to give effect to the provisions of this section and to preserve the confidentiality of medical, social, personal or financial records of patients.

Added L.1975, c. 654, § 1.

Statement of the Case

This case originated as a proceeding pursuant to N.Y. CPLR Article 78 to prevent the public disclosure of the report of appellee's audit of the books and records of the Florence Nightingale Nursing Home owned by appellant and to require appellee to afford appellant a right of examination and comment upon the report prior to any such disclosure.

Pending determination of this case, disclosure has been stayed pursuant to the order of Special Term, and of the Appellate Division, N.Y. CPLR § 5519(e)* except that

---

* The New York Court of Appeals has recently held as a matter of state law, under N.Y. CPLR § 5519(e), that the taking of a subsequent appeal automatically continues a pending stay, *DFI Communication, Inc.* v. *Greenberg*, 41 N Y 2d 805, ——

(footnote continued on following page)

appellee has been permitted to deliver copies of the report to the United States Department of Health, Education and Welfare (and by agreement of counsel, to the United States Attorney for the Southern District of New York), to the Moreland Act Commission constituted pursuant to N.Y. Executive Law § 6 investigating the nursing home industry and to Special Deputy Attorney General Charles E. Hynes, the special nursing home industry prosecutor.

This proceeding was apparently precipitated by the publication in the New York Times and the Village Voice (a New York City publication) of material attributed to appellee's draft report to the effect that appellant was being reimbursed with Medicaid funds for personal luxuries disguised as business expenses (J.S. 6-7; 11a; 17a). Appellant contended that this material was false and injurious to him (there is no support in the record for appellant's claim, JAS 15, that the State conceded that this was so). It is appellee's position that, if, in fact, material has been leaked, such disclosure was completely unauthorized but in any event it has nothing to do with this case.

Appellant claimed in his petition that the Welfare Inspector General lacks the legal right under State law to disclose the report under Article 27 of the Executive Law which establishes his office;* and that the exemption provisions of the State's Freedom of Information Law (N.Y. Public Officers Law, Article 6) and the Federal Social Security Act and regulations required that appellant be given an opportunity for prior inspection and comment on the report.

(footnote continued from preceding page)

N.E. 2d ——, —— N.Y.S. 2d —— (1977). It has been suggested that this applies as well to appeals from the courts of the State of New York to this Court, Newman, "Continuation of Stays on Subsequent Appeals", N.Y. Law Journal, April 21, 1977, p. 1, col. 1, p. 26, cols. 1, 3.

* Since the commencement of this proceeding, Article 27 was recodified at Article 4, §§ 46-50, thereof.

Appellee cross-moved to dismiss the petition for legal insufficiency. In his moving affidavit, he pointed out that the State Freedom of Information Law has placed additional duties of disclosure upon his office; that the report in question is an administrative survey report which is subject to public disclosure and which did not come under the disclosure provisions of the Federal Social Security Act.

This proceeding was argued at Special Term on January 31, 1975, at which time disclosure of the audit was stayed pending further order of the Court.

On September 12, 1975, that Court was formally advised by counsel for appellee of the enactment of N.Y. Public Health Law § 2805-e, L. 1955, c. 654, effective September 1, 1975 (reproduced pp. 2-3, *supra*). The statute in substance provided that all official reports pertaining to nursing homes and like facilities were to be available for public inspection at the facility and at the offices of the Department of Health. This statute, it was urged, mooted the case. The court agreed and granted judgment for appellee on the ground that the case had become moot (1a). On appeal, the Appellate Division affirmed (3a) agreeing with Special Term. It also rejected the argument that appellant had a right of prior inspection and comment (4a). Dissenting in part, Mr. Justice Kupferman would have allowed such inspection of a report under federal regulations and as a matter of fairness (5a-6a).

The Court of Appeals affirmed the Appellate Division on mootness grounds, rejecting at the same time appellant's claim under federal statute and regulations (7a).

ARGUMENT

Appellant has failed to raise a substantial federal question requiring plenary consideration by this Court.

I.

Appellant's assertion (J.S. 10-14) that the Social Security Act requires that a Medicaid provider be given an opportunity to examine and comment upon a report concerning his activities prior to its release, issued by a state officer in fulfillment of his duties under state laws, designed to vindicate a purely state interest, fails to raise a substantial federal question.

The basis of this claim is that the Welfare Inspector General is one of the State agencies charged with the maintenance of federal standards under the Medicaid law, J.S. 8, 42 U.S.C. § 1396(a)(9). This is absolutely erroneous. New York Social Services Law § 364 delegates this responsibility to the State Departments of Social Services, Health and Mental Hygiene. The reports referred to by appellant, J.S. 10-13, which are subject to prior inspection and comment under 42 U.S.C. §§ 1306(d)(e), 1396(a)(36) and 45 CFR 250.70, are the ones prepared by these agencies in fulfillment of the State plan submitted under New York Social Services Law § 363-a.

The office of the Welfare Inspector General created by New York Executive Law former Article 27 (now Article 4, §§ 46-50), which is part of the State Department of Audit and Control, is charged with the responsibility of inquiring into the operation of the entire state social welfare system. Among other things, it has the duty to protect the State's fiscal interests, which are considerable herein since the State contributes one-half of all Medicaid funds. It has no connection with the State Departments of Social Services, Health, Mental Hygiene or of the local agencies having similar functions denominated in the federal statutory provision relied upon by appellants.

The reports and investigations contemplated by Federal and State law herein may be different in scope and in purpose, but, there clearly is no conflict of governmental interests. Appellant has failed to show any intent upon the part of Congress to preempt the states from regulating Medicaid providers where their conduct touches State interests, *New York Department of Social Services* v. *Dublino,* 413 U.S. 405, 413 (1973). It would be difficult to read into law a restriction against the investigations by the independent State's Welfare Inspector to detect fraud and chicanery and to expose it to the public. In this, the report has now been held up from publication for two years.

II.

Appellant's invocation of the "fairness" doctrine JS 14-15, does not present an issue as to the validity of a state statute within the appellate jurisdiction of this Court contained in 28 U.S.C. § 1257(2). Furthermore, the point was never raised or briefed as a federal claim, either at Special Term or in the Appellate Division. This argument was apparently suggested to appellant by the dissenting Appellate Division Justice (6a). Although appellant argued the question before the New York Court of Appeals, it was not passed upon by that Court (7a); and see Official Reporter's summary at 40 N Y 2d at 1086. Thus, it is not reviewable herein, see e.g. *Cardinale* v. *Louisiana,* 394 U.S. 437, 438-439 (1969).

Even if the question were properly before the Court, it is completely insubstantial and unworthy of plenary consideration. Indeed, the authorities relied upon by appellant JS 14, *Rosenblatt* v. *Baer,* 383 U.S. 75, 86 (1966) and *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 261 (1974) [White, J., concurring], both rejected the private claim to preservation of one's reputation in favor of the broader social interest in the unfettered dissemination of information. Such a public interest in

free disclosure is present in the instant case. Not only is the public legitimately concerned with the expenditure of its taxes and the care of its aged and infirm, Cf. *Rosenblatt* v. *Baer, supra,* but this interest has been explicitly recognized by the Legislature and embodied in law, N.Y. Public Health Law § 2805-e, *supra.*

CONCLUSION

The appeal should be dismissed.

Dated: New York, New York
May 31, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel